Foote & Davies, Inc. *and* Carpenters District Council of Atlanta and Vicinity for and on behalf of Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 10-CA-18554

16 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

Upon a charge and amended charge filed on 22 and 28 September 1982, respectively, by Carpenters District Council of Atlanta and Vicinity for and on behalf of Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL-CIO,[1] herein called the Union, both of which were duly served on Foote & Davies, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint on 7 October 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 2 July 1982, following a Board election in Case 10-RD-742, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about 21 September 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 20 October 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 18 October 1982 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 22 November 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain but challenges the Union's certification on the basis that the Board erred in certifying the Union as the exclusive bargaining representative of Respondent's employees. In the Motion for Summary Judgment, counsel for the General Counsel alleges, first, that Respondent seeks to relitigate issues previously considered in the underlying representation case and, second, that no factual issues in the case warrant a hearing.

Our review of the record herein, including the record in Case 10-RD-742, discloses, *inter alia*, that pursuant to a Decision and Direction of Election, an election was conducted among the employees in a unit stipulated by the parties on 30 June 1981, and the tally of ballots furnished the parties after the election showed 15 votes cast for and 14 votes cast against the Union. There were seven challenged ballots, a sufficient number to affect the results of the election. The Union filed timely objections to conduct affecting the election. On 13 August 1981 the Acting Regional Director issued his Supplemental Decision and Order in which he overruled all objections, overruled four challenges, sustained one challenge, and ordered a hearing on the remaining two challenges if they remained determinative.

On 21 August 1981 the Union filed a request for review with the Board. On 1 September 1981 Respondent filed a motion to dismiss the Union's request for review claiming a procedural error in service. The Union, in turn, filed a supplemental brief in support of its request for review. On 13 October 1981 the Board denied Respondent's motion and denied the Union's request for review. A revised tally was served on the parties on 21 October 1981, showing 16 for and 17 against the Union with the 2 remaining challenged ballots being determinative.

On 21 October 1981 the Acting Regional Director issued a notice of hearing concerning the re-

[1] A motion to amend the complaint was filed with the Board on 3 January 1983 and duly served on the parties. The motion seeks to correct an inadvertent error in the designation of the Union wherein the word "Industrial" was omitted; the motion is hereby granted.

[2] Official notice is taken of the record in the representation proceeding, Case 10-RD-742, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

maining challenged ballots. The hearing was held on 13 and 17 November 1981. On 24 December 1981 the Hearing Officer's report issued. The Hearing Officer recommended that the challenge to Whiteford Maulden's ballot be sustained, and the challenge to Lanny Wiley's ballot be overruled. Thereafter, the Union filed exceptions to the Hearing Officer's recommendation that Maulden be found ineligible to vote, and Respondent filed exceptions to the report with regard to Wiley. Each party filed an answering brief in response to the exceptions of the other party. On 15 June 1982 the Board issued a Decision and Direction[3] to open challenged ballots reversing the Hearing Officer with regard to Maulden, and adopting her recommendation with regard to Wiley.

On 22 June 1982, in accordance with the Board's Decision, a revised tally was issued showing 18 votes for and 17 votes against the Union with no remaining challenged ballots. On 25 June 1982 Respondent filed objections to the revised tally claiming that the Board's Decision did not include a ruling on its exceptions concerning Lanny Wiley. In response to Respondent's motion, the Union filed a motion to dismiss and a motion for attorney's fees claiming that Respondent's motion was frivolous as the Board's Decision adopted the Hearing Officer's report as modified and was based on a consideration of all exceptions filed. Respondent filed a reply to the Union's objection and motions. On 2 July 1982 the Regional Director issued a Second Supplemental Decision and Certification of Representative overruling Respondent's objection to the revised tally.

On 14 July 1982 Respondent requested review of the Regional Director's Second Supplemental Decision claiming that the Regional Director erred in concluding that the Board had considered Respondent's exceptions in making its decision. The Union filed a brief in opposition to the request for review which Respondent answered in a subsequently filed brief. On 3 September 1982 the Board denied the request for review stating that in its earlier Decision it did consider Respondent's exceptions. The Board also denied the Union's motion for attorney's fees finding it to be without merit.

On 7 September 1982 and again on 20 September 1982 the Union, by letter, requested that Respondent recognize and bargain collectively with it. On 21 September 1982 Respondent, by letter, refused to bargain with the Union. In its answer to the complaint, Respondent admits that it had refused to bargain collectively with the Union. In its response to the Notice To Show Cause, Respondent offers as an affirmative defense the same argument it made in the representation proceeding concerning the challenged ballots of Wiley and Maulden. In addition, it contends that the Union's name in the charge and complaint is different from the certification and that difference should be the basis for denying the Motion for Summary Judgment. As noted earlier, the counsel for the General Counsel moved the complaint be amended to correct the inadvertent error with regard to the Union's designation which occurred in the first charge but which was corrected in the second amended charge served on Respondent on 27 September 1982. As the Board has granted the General Counsel's motion to amend the current complaint to make it consistent with the amended charge, we find Respondent's argument concerning it to be without merit. Its other argument concerning the challenged ballots has been fully litigated in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation with an office and place of business in Doraville, Georgia,

[3] 262 NLRB 238.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] Chairman Dotson did not participate in the prior proceedings in this matter. Had Chairman Dotson participated, he would have not allowed the employees who had obtained permanent employment to vote in this election. Chairman Dotson does not agree with the rationale set forth by the Board in the prior proceedings in allowing certain employees to vote and disallowing the vote of another employee. Consequently, Chairman Dotson would adopt a simple rule concerning voter eligibility and would not allow employees who had obtained permanent employment to vote in a representation election of a former employer. The issue would be determined upon whether the employee had actually obtained other permanent employment and not just interim employment pending recall to the former job.

where it prints commercial brochures. During the past calendar year, a representative period, Respondent sold and shipped from its Doraville, Georgia, facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Carpenters District Council of Atlanta and Vicinity for and on behalf of Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All maintenance employees and carpenters employed by the Respondent at its Doraville, Georgia, facility but excluding all employees currently covered by collective bargaining contract(s); all production employees, including those employees performing maintenance work incident to production functions; all maintenance employees employed in the typographical departments, mailing department, and building and grounds department, office clerical employees, plant clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On 30 June 1981 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 2 July 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about 7 September 1982, and at all times thereafter, including 20 September 1982, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 21 September 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 21 September 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Co.*, 149

NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing findings of fact and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Foote & Davies, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters District Council of Atlanta and Vicinity for and on behalf of Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All maintenance employees and carpenters employed by the Respondent at its Doraville, Georgia, facility but excluding all employees currently covered by collective bargaining contract(s); all production employees, including those employees performing maintenance work incident to production functions; all maintenance employees employed in the typographical departments, mailing department, and building and grounds department, office clerical employees, plant clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 2 July 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 21 September 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Foote & Davies, Inc., Doraville, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Carpenters District Council of Atlanta and Vicinity for and on behalf of Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All maintenance employees and carpenters employed by the Respondent at its Doraville, Georgia, facility but excluding all employees currently covered by collective bargaining contract(s); all production employees, including those employees performing maintenance work incident to production functions; all maintenance employees employed in the typographical departments, mailing department, and building and grounds department, office clerical employees, plant clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Doraville, Georgia, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Carpenters District Council of Atlanta and Vicinity for and on behalf of Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All maintenance employees and carpenters employed by the Employer at its Doraville, Georgia, facility but excluding all employees currently covered by collective bargaining contract(s); all production employees, including those employees performing maintenance work incident to production functions; all maintenance employees employed in the typographical departments, mailing department, and building and grounds department, office clerical employees, plant clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

FOOT & DAVIES, INC.